



Signed: October 25, 2010

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

Case No. 09-43072 EDJ-7

Adv. No. 10-4091 AJ

CAROLYN YVONNE BELL,

Debtor. /

AUGUST B. LANDIS, Acting
United States Trustee,*

Plaintiff,

vs.

CAROLYN YVONNE BELL,

Defendant. /

*Substituted for Sara L. Kistler,
Acting U.S. Trustee, who filed
the complaint herein.

DECISION

By this adversary proceeding, August B. Landis, Acting United States Trustee ("Landis"), seeks revocation of the discharge received by Carolyn Yvonne Bell, the above debtor ("Bell"). The court will enter its order revoking Bell's discharge.

A. Background

Bell is a chronic serial bankruptcy filer, who has demonstrated little or no regard for her responsibilities as a debtor under the

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1 Bankruptcy Code. She filed this voluntary chapter 7 bankruptcy case
2 (the "current case") on April 14, 2009. Prior to her filing of the
3 current case, specifically, during the period from February 2, 2007
4 through December 8, 2008, Bell filed six separate bankruptcy cases.
5 She did not file a complete set of schedules nor a Statement of
6 Financial Affairs, as required by Fed.R.Bankr.P. 1007(b)(1), in any
7 of these cases. The court dismissed all of them, either at Bell's
8 request or on motion of the trustee in the particular case.

9 By order filed August 20, 2007 (the "Bar Order"), the court
10 dismissed the fifth of these cases, No. 07-41802 EDJ-13, with
11 prejudice,¹ and ordered that Bell would be sanctioned in the sum of
12 \$5,000 if she filed another bankruptcy petition without prior
13 permission from the court. Thereafter, without permission, Bell
14 filed a sixth case, the current case, and two bankruptcy cases
15 subsequent to the current case.

16 In filing the current case, Bell was represented by attorney
17 Thomas Swihart ("Swihart"). Swihart also represented Bell in the
18 first two of the six bankruptcy filings that preceded this case, and
19 in the two cases Bell filed after this case.

20 In the current case, unlike the prior cases, Bell did file her
21 bankruptcy schedules and Statement of Financial Affairs. Sadly,
22 these documents were essentially a work of fiction. Bell failed to
23

24 ¹Bankruptcy Code § 349(a) provides that if the court
25 dismisses a bankruptcy case with prejudice, the debtor may not,
26 in a future case, discharge debts that were dischargeable in the
case dismissed.

1 disclose, among other things:

2 a. In her petition: any of her prior bankruptcy filings, as
3 required by the question at the top of page 2;

4 b. In her Schedule A - Real Property: a parcel of real
5 property in Richmond, California that she owned;

6 c. In her Statement of Financial Affairs: the sale within two
7 years prior to the filing of the petition of a parcel of real
8 property in Lafayette, California (the "Lafayette Property"), as
9 required by question 10, and her transfer of \$198,000 in equity in
10 the Lafayette Property to the buyer, a relative;

11 d. In her Statement of Financial Affairs: her rental income,
12 as required by question 2;

13 e. In her Statement of Affairs: her board and care business,
14 as required by question 18; and

15 f. In her Schedule B - Personal Property: a van that she
16 owned.

17 All of the foregoing papers were signed by Bell under penalty
18 of perjury. At the meeting of creditors mandated by Bankruptcy Code
19 § 341(a), Bell filled out a questionnaire required by Lois Brady,
20 trustee in bankruptcy ("Brady"), Exhibit 12 herein, in which she
21 affirmed in writing, among other things, that she personally did
22 "review and sign" her "petition, schedules, and other documents
23 filed with the court," that the information therein was "true,
24 complete and accurate," and that she had "listed everything [she]
25 owned in these schedules."

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1 Although these affirmations were generally false, Bell did tell
2 Brady in response to Brady's questioning at the meeting of creditors
3 that she owned a van she had not disclosed in Schedule B, and a
4 residential care business that she had not mentioned in Schedule B
5 nor in her Statement of Financial Affairs. Bell also revealed to
6 Brady that she had sold the Lafayette Property prior to the filing
7 of the petition, but misrepresented to Brady that she had sold it
8 for a purchase price of \$792,000, whereas the actual purchase price
9 was \$990,000. Final Closing Statement, Landis's Exhibit 16, line
10 401.

11 Nor did Bell reveal to Brady that she had transferred \$198,000
12 of real property equity to the buyer in connection with that sale:
13 Final Closing Statement, Exhibit 16, line 204, states that the
14 \$198,000 transfer to the buyer was "Gift Equity from seller to
15 buyer." Bell testified that of this amount, \$125,000 was in
16 repayment of a loan that Bell owed the buyer. For present purposes,
17 whether or not a portion of the undisclosed transfer was a loan
18 repayment is irrelevant in that disclosure in the Statement of
19 Financial Affairs in response to question 10 was required in either
20 case.

21 On August 26, 2009, Bell received her general discharge herein.
22 In November 2009, the subsequent bankruptcy filings by Bell came to
23 the attention of Asst. U.S. Trustee Barbara Matthews, whereupon
24 Bell's prior filings, undisclosed in her bankruptcy petition for the
25 current case, her violation of the Bar Order, and eventually, many
26 of the misrepresentations by Bell in her bankruptcy papers,

1 previously unknown to Brady or anyone in the U.S. Trustee's office,
2 came to light. The present adversary proceeding to revoke Bell's
3 discharge followed.

4 B. Discussion

5 Bankruptcy Code § 727(d)(1) provides:

6 (d) On request of the trustee, a creditor, or the United
7 States trustee, and after notice and a hearing, the court
8 shall revoke a discharge granted under subsection (a) of
9 this section if--

10 (1) such discharge was obtained through the fraud of the
11 debtor, and the requesting party did not know of such
12 fraud until after the granting of such discharge.

13 "As a general rule, to obtain relief under § 727(d)(1), the
14 plaintiff must prove that the debtor committed fraud in fact.

15 . . . The fraud must be proven in the procurement of the discharge
16 and sufficient grounds must have existed which would have prevented
17 the discharge." In re Bowman, 173 B.R. 922, 925 (9th Cir. BAP 1994)
18 (internal citations omitted).

19 To prove that a debtor's discharge should be revoked because of
20 a false representation, a plaintiff must show that the debtor
21 engaged in conduct that would have caused the bankruptcy court to
22 deny a debtor a discharge under Bankruptcy Code § 727(a)(4), had the
23 actual facts been known at the time. In re Guadarrama, 284 B.R.
24 463, 469 (C.D. Cal. 2002). In order to prove that a debtor's
25 discharge should be denied on account of a false oath, the plaintiff
26 must show that the debtor made a false oath in connection with the
case, the oath related to a material fact, and that the oath was
made knowingly and fraudulently. In re Retz, 606 F.3d 1189, 1197
(9th Cir. 2010).

1 Here, Bell does not dispute that her bankruptcy petition,
2 schedules, and Statement of Financial Affairs were false in numerous
3 respects. Nor does Bell dispute that the items she misrepresented
4 and omitted were material.² Nor does she dispute that, except for
5 the items she disclosed to Brady at the meeting of creditors,
6 neither Brady nor the U.S. Trustee's office had any knowledge, prior
7 to the granting of her discharge, of the many misrepresentations and
8 omissions in her bankruptcy papers.

9 1. Naegle Defense

10 Bell's primary defense, rather, is the incredible proposition
11 that she made no false oath in connection with her bankruptcy case
12 because she e-filed her petition, schedules, and Statement of
13 Financial Affairs through Swihart's law office, and because Swihart
14 cannot now locate the original documents that Bell had signed.³

15 As authority for this defense, Bell cites U.S. v. Naegle, 367
16 B.R. 1 (D.D.C. 2007). In Naegle, a criminal defendant had been
17 indicted pursuant to 18 U.S.C. § 152(3) for, among other things,
18 "knowingly and fraudulently mak[ing] a false declaration . . . or
19

20 ²A fact is material "if it bears a relationship to the
21 debtor's business transactions or estate, or concerns the
22 discovery of assets, business dealings or the existence and
23 disposition of the debtor's property." In re Wills, 243 B.R. 58,
62 (9th Cir. BAP 1999). See also, In re Retz, 606 F.3d 1189,
1198 (9th Cir. 2010).

24 ³Based on this defense, Bell, through her trial counsel,
25 David Smyth, moved to bar the U.S. Trustee from introducing any
26 evidence at trial, and moved for dismissal of the adversary
proceeding. The court denied both motions.

1 statement under penalty of perjury . . . in relation to a case under
2 title 11." A portion of the indictment was based on an allegedly
3 fraudulent Statement of Financial Affairs that the defendant had
4 filed with the bankruptcy court.

5 The district court dismissed this portion of the indictment on
6 motion of the defendant because the prosecution had presented no
7 evidence that the defendant had filed the signature page of the
8 Statement of Financial Affairs with the bankruptcy court, or had
9 ever provided a copy of the signature page to any persons associated
10 with the bankruptcy proceeding. Naegele, 367 B.R. at 5. ("In this
11 case, however, the SOFA [Statement of Financial Affairs] was filed,
12 but its signature page was not." Id. at 10.)

13 Here, unlike the situation in Naegele, the Bankruptcy Court
14 docket (Docket No. 1) for the current case shows that Bell did file
15 the signature pages for her bankruptcy petition, her schedules, and
16 her Statement of Financial Affairs, all under penalty of perjury.
17 Thus, apart from the fact that Naegele was a criminal case, its
18 reasoning is inapplicable here.

19 Moreover, Paragraph 8 of this court's Electronic Case Filing
20 Procedures, as in effect at the time Swihart electronically filed
21 the current case on Bell's behalf, and to which Swihart was subject,
22 provided:

23 Pleadings, including but not limited to petitions, lists,
24 schedules and amendments that are required to be verified
25 under FRBP 1008 . . . and all affidavits or other
26 pleadings in which a person . . . swears under oath or
penalty of perjury concerning the truth of matters set
forth in that pleading or document ("Verified Pleading")
may be filed electronically. A Registered Participant

1 [such as Swihart] . . . shall insure that the electronic
2 version conforms to the original, signed
3 pleading/document. Each signature on the original, signed
4 pleading/document shall be indicated on the electronically
5 filed Verified Pleading with the typed name of the person
6 purported to have signed the pleading/document. The
electronic filing of a Verified Pleading constitutes a
representation by the Registered Participant who filed it
that the Registered Participant has, in his possession at
the time of filing, the fully executed original, signed
pleading/document.

7 Electronic Case Filing Procedures, dated May 1, 2008, paragraph 8.

8 Here, the papers that Bell electronically filed through Swihart
9 did contain Bell's name with the required indication ("/s/") that
10 Bell had signed the originals. And although Swihart claims that he
11 is unable to find the signed originals, he testified, without
12 contradiction, that he had them at the time of Bell's bankruptcy
13 filing.

14 Bell's trial counsel, David Smyth, argued at trial that the
15 papers Swihart e-filed with the bankruptcy court may not have been
16 the same as the papers Bell signed. Bell, however, presented no
17 evidence to support this argument.

18 Finally, the court notes that, under the rule suggested by
19 Bell, any bankruptcy debtor would be free to falsify his or her
20 bankruptcy papers, with impunity, in any bankruptcy case in which
21 the papers are e-filed through counsel, and in which the debtor's
22 counsel claims that he or she cannot for some reason locate the
23 originals. Under such a rule, our bankruptcy system could not
24 function.

25 The court holds that Bell's defense based on Naegle fails.

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1 2. Lack of Fraudulent Intent Defense

2 Bell also argues that she did not intend to defraud anyone, and
3 blames Swihart for the omissions and misrepresentations in her
4 bankruptcy papers.

5 This defense fails. As to Bell's failure to disclose her six
6 prior bankruptcy filings in her petition, Swihart testified that it
7 was through his error and lack of familiarity with his e-filing
8 software that Bell's bankruptcy petition failed to disclose any of
9 these prior bankruptcy cases.

10 Even if true, however, Bell admitted that Swihart gave her all
11 of the documents to review before she signed them, and that she did
12 sign them. Obviously, Bell knew about her six prior bankruptcy
13 filings when she signed the petition stating that she had no
14 previous bankruptcy filings, and she so admitted under cross-
15 examination.

16 Moreover, in Bell's case No. 09-70695 N13, one of the two
17 bankruptcy cases Swihart filed for Bell after the current case, a
18 hearing was held on June 10, 2010 before Judge Newsome of this court
19 on the U.S. Trustee's motion for sanctions against Swihart. At that
20 hearing, Swihart used the same excuse - that he was brand new to e-
21 filing - to justify the additional bankruptcy filings in violation
22 of this court's Bar Order. Transcript of Proceedings before Judge
23 Newsome, June 10, 2010, page 3/24 - 4/19.⁴

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26 ⁴By order filed June 18, 2010, Judge Newsome imposed
sanctions against Swihart in the sum of \$2,200.

1 In short, the court is not persuaded that Swihart is the person
2 responsible for the misrepresentations in Bell's bankruptcy
3 petition. See In re Devers, 759 F.2d 751, 754 (9th Cir. 1985)
4 ("[I]t is axiomatic that the debtor cannot prevail if he fails to
5 offer credible evidence after the creditor makes a prima facie
6 showing.") Rather, Bell is responsible.

7 As to Bell's filing the current case in violation of the Bar
8 Order, Bell admitted that she was aware of the prohibition when she
9 filed the current case, but contends that any violation was
10 excusable because Swihart had advised her that the prohibition was
11 for only one year.

12 The court rejects this argument. The Bar Order contains no
13 such limitation. Bell admits that she read it before she filed the
14 current case. In an unsworn statement made to Judge Newsome,
15 Swihart claimed - not that he advised Bell - but that Bell advised
16 him, that the prohibition was for only one year.⁵

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18 ⁵At the hearing before Judge Newsome in case no. 09-70695,
19 Swihart stated to Judge Newsome:

20 And she [Bell] came back to me, did not tell me about
21 the previous chapter 7 that she had filed that was
22 dismissed for failure to file complete papers. She was
23 filing papers in pro per. She did tell me that she had
24 filed a few chapter 13's in pro per and that Judge
25 Jellen had ordered her not to file again for a year.
Now, I had no reason at that time to suspect that my
client was not telling the truth.

26 Transcript of hearing before Judge Newsome held June 10, 2010 in
case No. 09-70695, page 5/5-11.

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1 And regardless of Swihart's and Bell's conflicting stories as
2 to who advised whom of what, it is clear that, for reliance on the
3 advice of counsel to negate a fraudulent intent, the reliance must
4 be in good faith. See In re Adeeb, 787 F.2d 1339, 1343 (9th Cir.
5 1986); In re Retz, 606 F.3d 1189, 1199 (9th Cir. 2010). Here, it is
6 questionable whether Bell relied on any advice by Swihart when she
7 elected to disregard the Bar Order. But even if she did so rely,
8 such reliance was not in good faith.

9 As to Bell's failure to disclose the prepetition \$198,000
10 equity transfer in response to question 10 on her Statement of
11 Financial Affairs, Swihart testified that he was unaware until the
12 trial of this adversary proceeding that Bell had transferred
13 \$198,000 of equity in the Lafayette Property to a relative prior to
14 the filing. Thus, Bell cannot reasonably blame Swihart for her
15 failure to disclose this transfer.

16 C. Conclusion

17 Bell's bankruptcy petition, schedules, and Statement of
18 Financial Affairs are replete with numerous material omissions and
19 misrepresentations. The weight of the evidence showed that Bell
20 made the misrepresentations and omissions with the intent to defraud
21 her creditors and Brady.

22 It follows from the foregoing that Bell obtained her discharge
23 fraudulently, and that revocation of Bell's discharge is

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1 appropriate.⁶ The court will issue its order so providing.

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3 **END OF ORDER**
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24 ⁶Because of this holding, the court need not decide whether
25 Bell's filing of the current case in violation of the Bar Order
26 provides a separate and independent ground for revocation of her
discharge, or for vacation of the discharge order herein pursuant
to Fed.R.Bankr.P. 9024 and Fed.R.Civ.P. 60(b).

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